ORIGINAL

Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of the	)	
	)	
Implementation of Sections 202(f),	)	CS Docket No. 96-46
202(i), and 301(i) of the	)	
Telecommunications Act of 1996	)	
	)	
Cable Television Antitrafficking,	)	
Network Television and MMDS/	)	
SMATV Cross-Ownership Rules	)	

JOINT OPPOSITION TO PETITION FOR RECONSIDERATION

Bell Atlantic Corporation and NYNEX Corporation, by their undersigned attorneys, hereby oppose the "Petition for Reconsideration" filed by the California Cable Television Association ("CCTA") of the Commission's Order, FCC 96-112 (released Mar. 18, 1996).

I. SUMMARY

CCTA's Petition is a blatant attempt to misuse the Commission's processes and should be dismissed immediately. Despite labeling its pleading a petition for "reconsideration," CCTA in fact seeks nothing of the sort. The Order did exactly what Congress had instructed the Commission to do -- amend certain of its rules to incorporate provisions of the Telecommunications Act of 1996. CCTA does not question the Order's rule amendments at all, but instead seeks adoption of new

rules imposing MMDS ownership restrictions on telephone companies. These requested rules have nothing to do either with the rules addressed by the Order or with the 1996 Act.

Even if not fatally flawed on procedural grounds, CCTA's Petition should be dismissed as inconsistent with the law and policy mandated by Congress pursuant to the Cable Television Consumer Protection and Competition Act of 1992 and the 1996 Act. The 1992 and 1996 Acts sought to increase competition in the video programming industry by not permitting entrenched monopoly cable television companies to control potential competitors in the same market. As CCTA admits, "wireless cable" companies with ownership and/or investment by telephone companies have recently appeared as potential competitors to cable companies. CCTA would have the Commission restrict this pro-competitive development. CCTA's Petition is an obvious attempt to forestall this competition. It is contrary to the 1992 and 1996 Acts, and inconsistent with the Commission's attempts to promote the wireless cable industry as a viable competitor to cable monopolies, and it should be quickly rejected.

II. CCTA HAS NO LEGAL BASIS TO SEEK RECONSIDERATION.

CCTA's Petition requests that the Commission "reconsider" its decision implementing Section 202(i) of the 1996 Act and "promulgate regulations that would preclude in-region local exchange carriers ("LECs") from acquiring and operating MMDS facilities in a particular geographic area until that area is

subject to effective competition." Petition at 2-3. This request is not a petition for reconsideration, but a petition for rulemaking. The Commission's Rules do not permit CCTA to file a "petition for reconsideration" of the Order on the grounds contained in its Petition. Therefore, the Petition should be dismissed forthwith as an unlawful pleading.

First, CCTA fails to identify any part of the Order that it believes was incorrect. This is hardly surprising, since the Commission was simply amending Sections 21.912 and 76.501 of its Rules to implement the mandate of Congress in Section 202(i) of the 1996 Act. CCTA also has not objected to the Commission's decision not to use notice and comment procedures, nor could it because the law is well-settled that where an agency "regulation merely reiterates the statutory language," notice and comment procedures under Section 553 are not required.[1] Bereft of any ground for challenging the Order, however, the Petition loses any legal basis.

Second, CCTA's Petition is also improper under Section 1.106, which it states governs its pleading. Petition at 1. This rule requires that the petitioner be "adversely affected" by the Commission's final action. 47 C.F.R. § 1.106(b)(1). However, because the Commission merely modified its rules as directed by Congress in the 1996 Act, CCTA is not adversely affected by the Commission's

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[1]Kojamathy v. National Transp. Safety Board, 832 F.2d 1294, 1296-97 (D.C. Cir. 1987), cert. denied, 486 U.S. 1057 (1988); see Malkan FM Associates v. FCC, 935 F.2d 1313, 1318 (D.C. Cir. 1991); Gray Panthers Advocacy Comm. v. Sullivan, 936 F.2d 1284, 1291 (D.C Cir. 1991).

action. "[R]eprinting the statutory language in a regulation [could not] have affected [CCTA's] rights and interests." Kojamathy v. NTSB, 832 F.2d at 1297.

The relief sought by CCTA also demonstrates that neither it nor its members have any adversely affected interests in the Commission's modifications to Sections 21.912 and 76.501. CCTA has not asked the Commission to "reconsider" the rules adopted in the Order regarding cable-MMDS cross-ownership restrictions. Rather, CCTA has asked the Commission to adopt new and distinct regulations which would apply to LECs. Such LEC-related regulations are not mandated by the law implemented in the Order, nor could they affect the statutory restrictions on the ability of the members of CCTA to invest in MMDS facilities within their franchise areas. CCTA's Petition thus does not address any interest "adversely affected" by the revisions to Sections 21.921 and 76.501.[2] Accordingly, CCTA does not have any legal basis to file a petition for reconsideration of the Order, and its Petition should be dismissed immediately as an improper and unlawful pleading.

III. THE 1996 ACT PRECLUDES THE RULES SOUGHT BY CCTA.

Even if CCTA's attempt at reconsideration were procedurally proper, the Commission should dismiss the Petition outright as inconsistent with legislative

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[2]See Branton v. FCC, 993 F.2d 906, 908 (D.C. Cir. 1993), cert. denied, 114 S.Ct. 1610 (1994) ("In order to challenge official conduct, one must show that one 'has sustained or is immediately in danger of sustaining some direct injury' in fact as a result of that conduct").

intent as set forth in the 1996 Act. Under current law, as CCTA concedes, "telephone companies may, without restriction, purchase and operate MMDS stations in the areas where they provide telephone and video services." Petition at 1. Congress did not enact any change to this law as part of the 1996 Act, even though Congress comprehensively addressed many aspects of ownership of telecommunications, video and cable services. Congress had the opportunity to take exactly the action which CCTA suggests, and did not do so. The Commission should not reverse the Congressional judgment.

A. Pre-1996 Cross-Ownership Restrictions. As the Commission notes in the Order (at ¶ 5), Congress enacted an in-region cross-ownership restriction for cable company investments in MMDS facilities in Section 613(a)(2) of the Cable Television Consumer Protection and Competition Act of 1992 (codified at 47 U.S.C. § 533(a)(2) (1992)).

In 1993, the Commission ruled that Section 613(b)(1) of the 1992 Act (47 U.S.C. § 533(b)(1)), which restricts the ability of telephone companies to provide video programming to in-region subscribers, only applies to delivery of such programming via cable, and does not preclude telephone companies from owning and operating wireless MMDS facilities within their telephone service areas. Botetourt County School Board, 8 FCC Rcd. 6265 (1993). This interpretation of the statute was expressly affirmed on appeal barely one year before enactment of the 1996 Act. American Scholastic TV Programming Foundation, 46 F.3d 1173 (D.C. Cir. 1995).

If Congress had objected to the Commission's judicially-approved application of Section 613(b)(1), and/or to the resulting difference in treatment of cable company and telephone company investments in MMDS, then it could have enacted legislation as part of the 1996 Act to accomplish precisely what CCTA suggests in its Petition. "[I]f the Court has misperceived the political will, it has the assurance that because the question is statutory Congress may set a different course if it so chooses." Johnson v. Santa Clara County Transportation Agency, 480 U.S. 616, 629 n.7 (1987) (quoting Steelworkers v. Weber, 443 U.S. 193, 216 (1979) (Blackmun, J., concurring)). Since Congress did not modify the statutory plan regarding telco-MMDS cross-ownership, the Commission should view its current policy as consistent with the legislative intent. See id. ("Congress has not amended the statute to reject our construction, nor have any such amendments even been proposed, and we therefore may assume that our interpretation is correct").

B. Cross-Ownership Restrictions in 1996 Act. The 1996 Act provides positive evidence that the Commission's current interpretation of existing law and policy is correct. Congress did not simply ignore telephone company investments in video programming facilities. In the 1996 Act, Congress enacted a cable-telephone company in-region cross-ownership restriction:

> No local exchange carrier or any affiliate of such carrier owned by, operated by, controlled by, or under common control with such carrier may purchase or otherwise acquire directly or indirectly more than a 10 percent financial interest, or any management interest, in any cable operator providing cable service within the local exchange carrier's telephone service area.

Telecommunications Act of 1996, Pub. L. 104-104, § 652(a). Section 652(a) uses the terms "cable operator" and "cable service," which both court and Commission precedent have interpreted to exclude MMDS.[3]

The Conference Report to the 1996 Act points out that Section 652(a) was an amalgam of "the most restrictive provisions of both the Senate bill and the House amendment" and was intended "to maximize competition between local exchange carriers and cable operators within local markets." H. Rep. 104-458, 104th Cong., 2d Sess., at 174 (1996). Had Congress intended to achieve the result sought by CCTA, or found such restrictions necessary or useful to promote competition, it could have taken steps in Section 652 to limit telephone company investment in MMDS as well as cable companies. However, it did not do so. The Commission's current policy on telephone company ownership of in-region MMDS stations is thus consistent with both the language and intent of the 1996 Act.

Considering CCTA's proposed restrictions on telco-MMDS ownership would undermine the objectives of Congress and the Commission in another way as well. In both the 1992 and 1996 Acts, Congress has consistently sought to promote competition in video programming services by encouraging the development of new

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[3]American Scholastic TV Programming Foundation, 46 F.3d 1173 (D.C. Cir. 1995); Botetort County School Board, 8 FCC Rcd. 6265 (1993); Definition of a Cable Television System, 5 FCC Rcd. 7638 (1990) (finding that definition of "cable system" does not include wireless cable).

technologies such as MMDS.[4] The Commission itself has repeatedly declared that its cardinal policy in the video market is to foster added competition to incumbent cable operators.[5] In its most recent assessment of competition in the multichannel video services market, completed in December 1995, the Commission found competition to cable from MMDS still lacking:

> Despite its recent gains, the wireless cable industry remains a relatively small provider of multichannel video services in terms of market share. As of the end of September 1996, only 0.8% of television households subscribed to wireless cable services, compared to 64.3% of television households subscribing to wired cable systems. . . .
>
> Although competitive pressures from alternative video distributors are increasing, the Commission concludes that markets for the distribution of video programming are not yet competitive. Most video distribution markets continue to be highly concentrated, and incumbent cable operators face direct competition from overbuilders in only a few markets. . . .

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[4]See Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service, Notice of Proposed Rulemaking, 9 FCC Rcd. 7665 (1994) at 7667 n. 7: "An essential element of the 1992 Cable Act is promoting increased competition and diversity by fostering the development of alternative multichannel video programming distributors."

[5]See, e.g., Amendment of Parts 21 and 74 of the Commission's Rules, supra n. 4, 9 FCC Rcd. at 7666-67: "An essential component of competition is choice. As we recognized in our recent report to Congress, consumers in the market for video programming do not have enough choices. . . . This rulemaking is one of several administrative improvements directed toward enhancing the development of wireless cable operators as viable competitors in the video programming marketplace."

> Despite the growth of DBS and wireless cable subscribership in the past year, competitive rivalry in most local video programming distribution markets is insufficient to constrain the market power of incumbent cable systems.[6]

LEC investment in MMDS systems provides those systems with the financial backing to seek to expand into viable competitors to entrenched cable monopolists. It would be nonsensical to impose the same restrictions on MMDS providers that Congress and the Commission have adopted to curb the power of incumbent cable operators. The goal of the 1996 Act was to promote new competition, not, as CCTA wants, frustrate it.

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[6] Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Second Annual Report, 11 FCC Rcd. 2060, 2096, 2150, 2158 (1995).

IV. CONCLUSION

For the reasons set forth above, CCTA's Petition should be dismissed forthwith as procedurally defective. In any event, promulgating the rules suggested by CCTA would be inconsistent with the intent of Congress as well as with Commission precedent and policy. CCTA's Petition is an obvious attempt to stifle the development of competition to cable's enormous market power, and should be rejected immediately without further consideration.

Respectfully submitted,

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Dated: May 29, 1996

CERTIFICATE OF SERVICE

I, Winifred C. Parker, hereby certify that on this 29th day of May, 1996, I caused a copy of the foregoing "Joint Opposition to Petition for Reconsideration" to be served on the persons specified below by first-class mail, postage prepaid, or by hand delivery:

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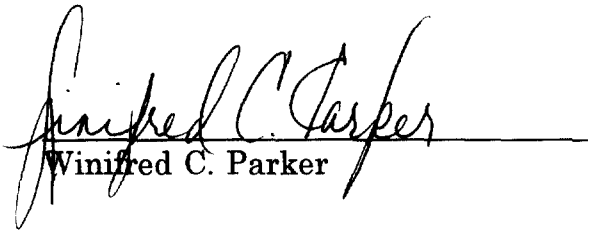

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